No. 355.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 355.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,

vs.

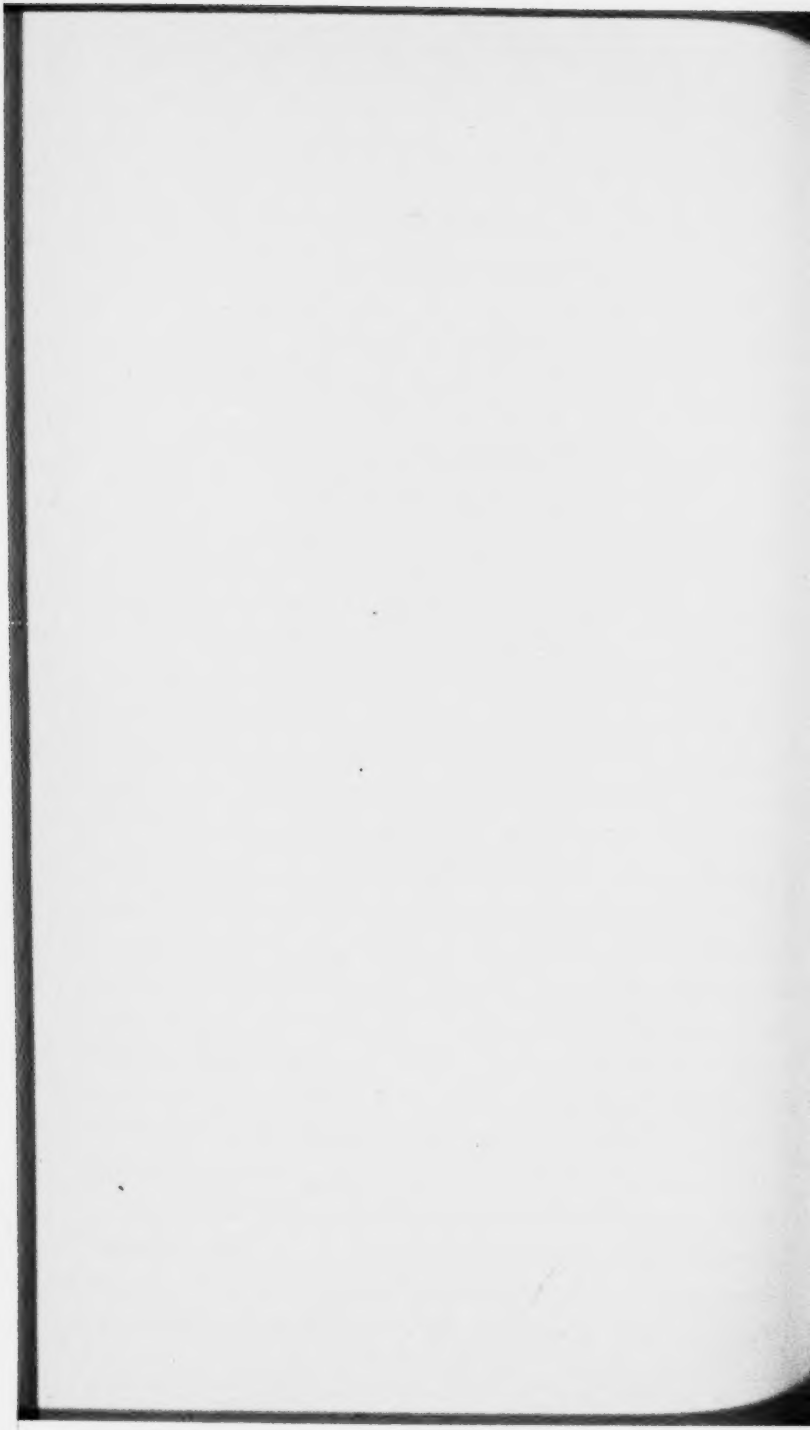
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
NOEL GALE,
Of counsel for plaintiffs in error.

Washington, October 11, 1900.



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v.
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In error to the Supreme Court of the State of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

The writ of error in the above case, No. 355, presents for review a final judgment of the Supreme Court of Mississippi (record, p. 230), which affirmed a judgment in favor of the defendant in error above, Wirt Adams, as state revenue agent, who was plaintiff below, against the plaintiffs in error, The Yazoo and Mississippi Valley Railroad Company and other railroad companies, defendants in the court of original jurisdiction, for taxes imposed and levied for the year 1898 upon a portion of the railroad of the Yazoo Company, which taxes formed the subject matter of the controversy. The judgment below was for $91,958.98 and for a further sum of $4,597.94 damages on appeal, together with costs to be taxed.

The declaration filed by the state revenue agent set forth among other things that, " by force of the statutes in such cases made and provided the said defendants have become and are indebted to the State of Mississippi and the said several counties and towns for current past-due

and unpaid State, county, and municipal taxes on said property and on privileged taxes for operating the same for the year 1898 as follows" (record, p. 5). To this declaration, the railroad companies first interposed a plea, a demurrer to which was sustained, and leave was granted the defendants to answer over (*id.* p. 30). The railroad companies then interposed an amended or second special plea, which set forth and alleged a contract with the state for the appropriation of taxes for the payment of construction of the railroad, based upon section 21 of the charter of the Mobile and Northwestern Railroad, which had been made applicable to the Yazoo Company under the legislation of 1882, and which is as follows (see full reference to statutes in appendix to brief in No. 35):

> "SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company

that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt shall be in full of all taxes, county, State, and municipal, to which said company shall be subject. Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law." (Laws Mississippi, 1870, p. 268).

The second plea specifically averred that the above provision constituted a contract protected by section 10, Article I., of the Federal Constitution (record, p. 32), and that the statutes under which the suit for taxes was brought were in violation of the same section (*id.*, p. 34).

A third plea filed by the Yazoo Company set forth in substance prior suits between one Lambert, a sheriff and tax collector, and the Yazoo Company, involving taxes for the years 1891 and 1892, wherein it was adjudged by the Supreme Court of Mississippi that the effect of the merger of 1892 was not the formation of a new company, and that the privilege or right of appropriation under section 21 had not been lost. This judgment of the Supreme Court was claimed to be *res adjudicata* against the state as to the taxes of 1898 sought to be collected in this suit on the ground that thereby the constitutionality of section 21 was settled in favor of the railroad company, both as respects the constitution of 1869 and that of 1890.

There were subsequent replications, rejoinders and demurrers, in the course of which, among other matters, the state revenue agent set up certain proceedings before the

State Railroad Commission as *res adjudicata*, and also set up, as a bar, the judgment of the Supreme Court of Mississippi in the main suit now No. 35 on the calendar of this term (record, p. 182). Further reference to these different pleadings is not essential to the discussion or decision of this case in view of the action of the Supreme Court of Mississippi, which applied the well settled rule that a demurrer searches the whole record and attaches to the first defect (*State* v. *Bowen et al.*, 45 Miss. 347, 349; *McGavock* v. *Whitfield et al.*, 45 Miss. 452, 460), the court saying (record, p. 231):

> "We deem it unnecessary to follow counsel into his labyrinth of special pleadings or to pass upon the various questions which they present. It is sufficient to say that all the defenses sought to be availed of by defendants rest upon and must fall with their pleas. . . . The various demurrers should have been extended back to the pleas and sustained."

The questions on the merits are substantially the same as those presented in what is called the main case (No. 35 upon the calendar of this term and No. 244 upon the calendar of the last term). The relation of the railroad companies other than the Yazoo Company to the controversy is quite immaterial. The whole case turns upon the validity and present existence of the above statutory provision.

SPECIFICATION OF ERRORS

The plaintiffs in error assert and intend to rely upon the following errors of the court below:

(1) That the court erred in holding that the provisions of section 21 did not constitute a valid and irrepealable contract between the state and the railroad company under the Mississippi constitution of 1869.

(2) That the court erred in holding that such a contract was prohibited by the constitution of 1890.

(3) That the court erred in holding that the consolidation of 1892 had operated to terminate the existing contract.

(4) That the court erred in permitting recovery of taxes under and by virtue of revenue laws passed subsequent to the charters of 1882 and 1884, and thereby giving effect to statutes which impaired the obligation of the contract in suit.

AS TO THE JURISDICTION.

The court below, whose judgment is now under review, having reduced the inquiry to the sufficiency of the pleas, the simple question is whether the pleas properly raise the federal question; in other words, whether the effect of the pleas was sufficient to draw in question the constitutional validity of subsequent legislation under the contract clause, and whether the decision below was in favor of the validity of such subsequent legislation.

The brief filed by the defendant in error in this court on the motion to dismiss or affirm suggests two questions of jurisdiction which should be briefly considered before discussing the merits.

I.

The defendant railroad companies in the third special plea insisted upon the *Lambert* case (70 Miss. 779) as *res adjudicata* in that it not only related to the same property but involved and decided in its favor the very point now presented on the merits. The state supreme court held, for reasons set forth at length in its opinion in what is called the main case (record, p. 656, in No. 35 upon the calendar of this court), that the *Lambert* case did not constitute *res adjudicata*. The point now urged on behalf of the revenue agent seems to be that a decision that a prior judgment does not constitute *res*

adjudicata is based upon a non-federal ground, and that because it is a non-federal ground and is part of the decision below this court has no jurisdiction. This claim must arise from a misapprehension of the rule of practice and its reason. Where there are two grounds of decision, one federal and the other non-federal, and each is sufficient in itself to dispose of the whole case, then this court will decline to exercise jurisdiction. But where a defendant pleads a prior judgment as *res adjudicata*, and the court holds that it does not constitute *res adjudicata*, this decision does not of itself dispose of the litigation, but leaves still the merits of any remaining defense to be considered and decided. On the other hand, if the court should decide that the plea of *res adjudicata* was good, and it covered the whole case, and was sufficient to dispose of the litigation, that might be a sufficient non-federal ground.

II.

It is also suggested that, even if the decision of the state supreme court was based on a federal ground, which would give this court jurisdiction, "then is it not the duty of this court to sustain the judgment of the court below, if it can be done, on the decisions of the circuit court in preference to those of the supreme court, the one involving only non-Federal and the other Federal questions?" (defendant's brief on motion to dismiss, p. 10). The defendant in error, in support of this contention that the court should go beyond the judgment which it is now reviewing, and be governed by what the court of original jurisdiction decided, argues that the state supreme court "was clearly in error in extending the demurrers back to the pleas and holding that it was

unnecessary to decide on those replications" (defendant's brief, p. 22). This must be a question of local practice and procedure, and it can hardly be possible that this court will overrule the state supreme court on such a point, and consider the case upon all the grounds which were before the court of inferior jurisdiction and which the appellate court declined to adopt. This court has lately held that, in determining the grounds of the decision under review on writ of error to a state court, it is only the conclusions of the highest state court that are to be considered. In *Allen v. Southern Pacific Railroad Co.*, 173 U. S. 479, 489, Mr. Justice White, referring to the adequacy of a non-federal ground to sustain the judgment under review, said:

> "In inquiring whether this is the case we are unconcerned with the conclusions of the trial court, or with those of a department of the Supreme Court of California, and consider only the final action of the Supreme Court of the State in disposing of the controversy now before us."

So in *San Pedro &c. Company* v. *United States*, 146 U. S. 120, 136, this court said:

> "Our inquiry is limited to the rulings of the Supreme Court of the Territory; it is its judgment which we are reviewing."

One of these replications which the state supreme court has practically said should be disregarded was to the effect that the judgment in what is called the main case (No. 35 on the calendar of this term) was *res adjudicata*, and should preclude any re-examination of the merits even on the federal question in the subsequent suit (record, p. 182). It ought to be sufficient, in answer to this point, to say that the state supreme court saw fit not to sustain it.

The rule in Mississippi upon this point will be found in the main case (No. 35), at p. 657, where Whitfield, J., said:

> " Nor are the taxes of any one year, the same cause of action as the taxes of any other year, in the only proper technical signification to be given to the term *res adjudicata*. It is so held by the United States Supreme Court in Keokuk v. Mo., [152 U. S. 304], and in Phœnix Ins. Co. v. Tennessee, 161 U. S. at p. 186. A decision for the taxes for any one year may be invoked under the doctrine of *stare decisis*, where the taxes of any other year are involved under the same claim. But certainly never, on any clear thinking or correct reasoning, under the doctrine of *res adjudicata*."

If, as the defendant in error in this court contends, the federal question was not raised or passed on in the main suit (No. 35), then the judgment in that suit could not be *res adjudicata* in a suit for the taxes of another year, although, if the federal question had been actually decided in that case on the second appeal, as the plaintiffs in error contend, then the plea of *res adjudicata* would have presented a very serious question under *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, and *Werlein* v. *New Orleans*, 177 U. S. 390, *provided the court below had put its decision upon that ground.* It did not do so. The reason probably was that if the court had not decided in the prior case that a judgment for the taxes of one year was not *res adjudicata* in an action for the taxes of another year, the railroad companies would then have been entitled to the benefit of the decision in the *Lambert* case (70 Miss. 779), which the court overruled in the main case.

III.

The fact that these suits are brought under statutes subsequent to 1882 and 1884 and that the decision below gives effect thereto, is apparently not disputed. Thus, in

stating what was decided in the main case, the brief of the defendant in error in this case sets forth (p. 25):

> "5th. That said exemption was repealed by the laws of 1886 and 1890 and the code of 1892."

It is also stated on page 33 of the brief that—

> "This suit is for the taxes which accrued on December 15, 1898, under section 3801 of the Code of 1892."

The result of the subsequent statute as given effect by the decision below is clearly to deprive the Yazoo Company of the right to pay its taxes in the manner provided in section 21, to impair the enjoyment of the benefits of the contract, and to prevent its due enforcement (*McGahey* v. *Virginia*, 135 U. S. 662, 693).

ON THE MERITS.

I.

AS TO THE EFFECT OF THE MISSISSIPPI MILLS CASE.

In answer to the contention of the railroad companies that the statutory provision involved in these cases is what it purports to be on its face—namely, an appropriation of taxes to certain definite public objects—and is not an exemption from taxation, the position of the state revenue agent is stated in his brief on the motion to dismiss in this case (p. 14) as follows:

> "However plausible this might have been, or might be, if urged as an original proposition, it is not available to the defendants in this particular case, because their charters were granted and accepted in 1882 and 1884 and the Mississippi Mills case was decided in 1878."

The argument seems to be that because, in the *Mississippi Mills* case, the provision was only discussed as constituting an exemption from taxation, the defendant railroad companies are now precluded from insisting that the

true nature of the statutory provision was a valid appropriation of taxes.

The reason why, in the *Mississippi Mills* case (1878), the point as to appropriation of taxes was not made, is evident. An appropriation of taxes in aid of manufacturing establishments could not have been sustained because for a private purpose. The counsel for the owners of the manufactories there affected undoubtedly appreciated that the sole ground upon which such legislation could possibly be sustained in aid of private enterprises was by claiming the power of the legislature to exempt classes by not taxing them under the principle of classification. The doctrine that public funds or taxes could not be appropriated for such private purposes had then been but recently reiterated in the leading cases of *Loan Association* v. *Topeka*, 20 Wall. 655 (Oct. Term, 1874), and *The State* v. *Osawkee Township*, 14 Kansas, 418 (1875).

But aside from this consideration, the answer to the argument of the state revenue agent on this point is simple, viz:

(1) The decision in the *Mississippi Mills* case was expressly overruled by the Mississippi Supreme Court and adjudged to have been unsound in No. 35 (record in that case, p. 670). It cannot surely be now held that, so far as this prior decision tends to sustain the position of the railroad companies, it is to be set aside, but, so far as its reasoning or language militates against that position, it is to be upheld. The Supreme Court of Mississippi has overruled the case on all the important points now presented, and in considering the true nature of the legislative contract before this court, it can have no effect as a precedent.

(2) The *Mississippi Mills* case involved a charter differing fundamentally from the railroad charter in suit.

In the prior case, the appropriation of taxes was to a class of manufacturing corporations, whilst, in the charter before the court, the grant of taxes is to an individual corporation; in the present case, the railroad charter expressly recites that the appropriation is irrepealable, whilst, in the prior case, the act contained no such provision. The essential difference is pointed out by the Supreme Court of Mississippi in the opinion in what is called the main case, as follows (record in No. 35, p. 669):

> "The case before us most emphatically does NOT present a claim to exemption under a charter identical with the charter in Miss. Mills *v.* Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Miss. Mills *v.* Cook, and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented."

(3) Even if the decision in the *Mississippi Mills* case had not been overruled and had been rendered in a case involving substantially the same statutory provision, this court would nevertheless determine for itself the true nature of the enactment now before it and whether or not it constituted a valid contract of appropriation (*Pleasant Township* v. *Ætna Life Insurance Co.*, 138 U. S. 67, 71; *Douglas* v. *Kentucky*, 168 U. S. 488, 500; *Houston and Texas Central Rd. Co.* v. *Texas*, 177 U. S. 66, 77).

In cases under the contract clause, this court has never considered itself bound by the views of the state court, but has always decided independently the essentially federal question as to the existence or non-existence of the contract. Moreover, the court will not consider itself bound in any way by the prior decision of the state supreme court when

it appears that it was rendered in a case involving a different form of charter applicable to an entirely different class of corporations. In the *Mississippi Mills* case, the legislation related to private enterprises; in the case at bar, the legislation relates to a public enterprise.

II.

THE GOOD FAITH AND INTENTION OF THE LEGISLATURE.

The enactment on its face is an appropriation of taxes for a public purpose in a form sanctioned by the practice of the legislature of Mississippi for many years before 1882. It does not purport to be an exemption from taxation. It leaves the railroad property subject to all forms of taxation, and simply provides that such taxes, when assessed, shall be appropriated to the payment of construction debt for a public improvement and may be paid in that manner. The power of the legislature to make such an appropriation for the construction of a railroad is perfectly well settled. The only answer is that the appropriation was a sham and a fraud, made for the purpose of circumventing the constitution of 1869, and was, in fact and effect, nothing but an exemption from taxation.

Now, the legislature might have agreed to appropriate annually a certain sum, or it might have agreed to assume and pay any part of the cost of constructing a railroad as a necessary public improvement, or it might have agreed that the bonds of the railroad company issued for such construction should be received in payment of taxes. (*Woodruff* v. *Trapnall*, 10 How. 190, 207; *Furman* v. *Nichol*, 8 Wall. 44, 59; *Keith* v. *Clark*, 97 U. S. 454; *Virginia Coupon Cases*, 114 U. S. 270, 279; *McGahey* v. *Virginia*, 135 U. S. 662, 693). Such provisions would have been valid legislation and would have been valid contracts; yet they would not have constituted exemp-

tions from taxation. For the argument's sake, we may assume that, in certain aspects of any of these modes of state aid, the enactments might be as beneficial to a railroad company as an exemption or substantially equivalent to it, although the difference between the two forms of legislation becomes apparent when we analyze the effect of the various provisions. But the element of equivalency cannot make invalid what would otherwise be clearly valid. A statutory provision for the appropriation of such a sum annually or from time to time as should be sufficient to pay a part of the cost of construction might not be enforceable against the state because of the difficulty in suing it under the Eleventh Amendment; but this form of legislation would, nevertheless, clearly constitute a valid contract and not an exemption from taxation. On the other hand, a provision that construction-debt bonds issued by the railroad company should be received in payment of taxes would be enforceable as a contract, binding upon all tax officers. That form was not adopted because such an enactment would not have accomplished the declared purpose of the legislature in the case at bar, which was to secure the construction of the railroad as creating new taxable property, to confine the taxes appropriated to those levied on this newly-created property, and to secure the prompt discharge from debt of a great public improvement. Surely, it cannot be maintained that a constitutional inhibition of exemption from taxation of itself, without more, prevents a legislature from aiding the construction of a railroad as a necessary public improvement, even though such aid may, in ultimate practical effect, be as beneficial to a railroad company as an exemption. The doctrine of equivalents has never been carried so far.

The court, in considering and determining the true nature of the enactment in question, is asked to go beyond and disregard the language of the statute itself, which purports to enact a perfectly valid and honest provision, and one obviously beneficial to the people of Mississippi, in order to hold that the legislature was acting in bad faith and dishonestly; that the language used was a sham and a fraud, and that the purpose was deliberately to circumvent and nullify the constitution of the state, which it was the sworn duty of its members to regard and enforce. It is submitted that this court will not indulge in any such reasoning or speculation, but will again declare, as it has so often decided, that every presumption is in favor of the good faith of a legislative body; that it is no part of the province of the judiciary to challenge or question the integrity of the action of a legislature, and that if, under any fair and reasonable aspect, a given enactment is within legislative power, the validity of the provision will be upheld. As was said by Mr. Justice Peckham in *Houston and Texas Central Rd. Co.* v. *Texas*, 177 U. S. 66, 89:

> "If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the part of the legislature that the paper should circulate as money. There must, in other words, be an intention to violate the constitution.
>
> "A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists and to which the members have sworn obedience, is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil from the very acts themselves which are under discussion, and if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction rather than one which invalidates them, because they were enacted with a direct purpose to violate the state constitution."

III.

THE TRUE NATURE OF THE STATUTORY PROVISION IN QUESTION AND THE EFFECT OF THE CONSOLIDATION OF 1892.

The true nature of the statutory provision in question as a proper and valid exercise of legislative power in aid of a necessary public improvement and its validity under the Mississippi constitutions of 1869 and 1890 are considered at length in the brief filed in No. 35 (October term, 1899, No. 244). A reference to that brief is prayed as tending to avoid unnecessary repetition and labor. So also as to the effect of the consolidation. That point is fully discussed in the former brief. If the agreement to appropriate taxes was a valid contract and not an exemption from taxation, it would pass to the successor consolidated company, with the property to which it is appurtenant, just as any other contract or property right. This aspect, as argued in the former brief, renders quite immaterial the question whether or not the consolidation of 1892 technically constituted a merger or the creation of a new corporation. Neither the Mississippi constitution of 1869 nor the constitution of 1890 prohibited appropriations of taxes in aid of public improvements, and no reason has been suggested why such an existing agreement on the part of a state, which has been fully performed on the part of the railroad company, should not pass to a successor or consolidated company with the property to which it is appurtenant, particularly in this instance in view of the terms of the statutes authorizing the consolidation and of the fact that the constitution of 1890, after which the consolidated company was formed, did not prohibit such appropriations of taxes notwithstanding the fact that, for many years, it had been the constant practice of the legislature to make them.

CONCLUSION.

It is, therefore, submitted that this court has jurisdiction to adjudicate the federal question of contract and its impairment, and that the judgment of the Supreme Court of Mississippi should be reversed on the merits.

Washington, October Term, 1900.

WILLIAM D. GUTHRIE,
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